



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution filed by the Landlord under the Residential Tenancy Act, (the “*Act*”), for a monetary order for unpaid rent or utilities, permission to retain the security deposit and an order to recover the cost of filing the application. The matter was set for a conference call.

The Landlord and his Counsel attended the hearing, and both were affirmed to be truthful in their testimony. As the Tenant did not attend the hearing, service of the Notice of Dispute Resolution Hearing documentation was considered. Section 59 of the *Act* and the Residential Tenancy Branch Rules of Procedure states that the respondent must be served with a copy of the Application for Dispute Resolution and Notice of Hearing. The Landlord testified that the documents were sent by registered mail on June 19, 2018, a Canada post tracking number was provided as evidence of service. Section 90 of the *Act* determines that a document served in this manner is deemed to have been served five days later. I find that the Tenant had been duly served in accordance with the *Act*.

The Landlord was provided with the opportunity to present his evidence orally and in written and documentary form, and to make submissions at the hearing.

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this decision.

Preliminary Matter

The Landlord's application included a request for Substituted Service; the Landlord is requesting approval to serve the Tenant by means of e-mail.

The Landlord testified that an additional evidence package had been sent to the Tenant by registered mail on August 7, 2018, but was returned to him unclaimed, a Canada post tracking number was provided as evidence of service. The Landlord testified that when the mail was returned to him, he served the additional evidence to the Tenant via email.

The Residential Tenancy Policy Guideline 12. Service Provisions states that following:

"Where a document is served by Registered Mail, the refusal of the party to accept or pick up the Registered Mail, does not override the deeming provision. Where the Registered Mail is refused or deliberately not picked up, receipt continues to be deemed to have occurred on the fifth day after mailing."

In this case, I find that the Landlord's registered mail, dated August 7, 2018, was in fact returned "unclaimed." I also find that the Tenant's refusal to pick up the registered mail from the Landlord does not constitute non-service or an override the deeming provisions pursuant to section 90 of the *Act*. Accordingly, I find that the additional evidence was received by the Tenant on August 13, 2018, five days later after it had been mailed by the Landlord and that the Tenant had been duly served with this evidence in accordance with the *Act*. Therefore, I find that there is no need for me to make a determination regarding the Landlord's application for substituted service.

Issues to be Decided

- Is the Landlord entitled to monetary compensation for unpaid rent and utilities?
- Is the Landlord entitled to retain the security deposit for this tenancy?
- Is the Landlord entitled to recover the filing fee for this application?

Background and Evidence

The Landlord testified that the tenancy began on February 10, 2018, as a one-year fixed term tenancy. Rent in the amount of \$2,650.00 was to be paid by the first day of each month and the Landlord had been given a \$1,325.00 security deposit at the outset of the tenancy. The Landlord provided a copy of the tenancy agreement into documentary evidence.

The Landlord testified there was a previous hearing to enforce a 10-Day Notice to End Tenancy for Unpaid Rent or Utilities, where he received an order of possession and a monetary order for the May 2018 rent. The Landlord testified that he was not able to get the Tenant out of the rental unit until July 8, 2018, and that the Tenant had not paid the June or July rent.

The Landlord is requesting a monetary order for the outstanding June and July 2018 rent as well as the associated late fees as per section 13 of the tenancy agreement.

Analysis

Based on the evidence before me, the testimony of the Landlords, and on a balance of probabilities that:

I accept the undisputed testimony of the Landlord that the Tenant moved out in accordance with the Order of Possession on July 8, 2018. I also accept the testimony of the Landlord that the Tenant did not pay the June or July rent as required by their tenancy agreement.

Rules about payment and non-payment of rent

26 (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

I find that the Tenant breached section 26 of the *Act* when she did not pay the rent in accordance with the tenancy agreement. Therefore, I find that the Landlord has established an entitlement to recover the outstanding rent for the months of June and July 2018. I award the Landlord the recovery of the \$5,300.00 in outstanding rent.

The Landlord is also requesting \$750.00 in outstanding late fees for June 2018, pursuant to section 13 of the tenancy agreement. Section 13 of the tenancy agreement states the following:

“The Tenant will be charged an additional amount of \$25.00 per day for any rent that is received after the later of the due date and the expiration of any grace period under the *Act*, if any.”

In order to determine if this section of the tenancy agreement is enforceable. I must refer to the Residential Tenancy Regulations (the *Regulations*). Section 7(d) of the Regulation sets out the allowable late fees that a landlord may charge during a tenancy.

“Non-refundable fees charged by landlord

7 (d) subject to subsection (2), an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent;”

Pursuant to section 7(d) of the Regulations, I find that the maximum fee that a landlord may charge a tenant for late payment of rent to be \$25.00. I find that the fee set out in section 13 of the tenancy agreement to be contrary to the maximum allowable under the Regulations.

Section 5 for the Act prevents a landlord and tenant from contracting outside of the requirements and limitations of the Act, and the Regulation.

“This Act cannot be avoided

5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.”

Pursuant to section 5 of the *Act*, I find that section 13 of the tenancy agreement to be of no effect.

However, I also find that there was a clear understanding between the parties to this tenancy agreement that there was the potential for the charge of late fees under their agreement. I find that the Landlord is entitled to charge the maximum allowable late fee of \$25.00 for the late payment of rent. In this case, I find that the Tenant did pay her June and July rent late. Therefore, I award the Landlord \$50.00 in late fee for June and July 2018.

As the Landlord has been successful in his application, I find that the Landlord is entitled to recover the \$100.00 filing fee paid for this hearing.

I grant the Landlord a monetary order of \$4,125.00, consisting of \$5,300.00 in outstanding rent, \$50.00 in late fees and the recovery of the \$100.00 filing fee for this hearing, less the \$1,325.00 security deposit that he is holding for this tenancy.

Conclusion

I find for the Landlord under sections 67 and 72 of the Act. I grant the Landlord a **Monetary Order** in the amount of **\$4,125.00**. The Landlord is provided with this Order in the above terms, and the Tenant must be served with this Order as soon as possible. Should the Tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: October 2, 2018

Residential Tenancy Branch